

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EFRAIN P. BRITO-GONZALEZ)	
Claimant)	
)	
VS.)	
)	
BEEF PACKING COMPANY)	
Respondent)	Docket No. 250,266
)	
AND)	
)	
WAUSAU INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the August 13, 2004 Order on Motion to Dismiss entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Appeals Board (Board) placed this matter on its summary calendar for a determination without oral argument.

APPEARANCES

Claimant appeared Pro Se.¹ Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier (respondent).

¹ Claimant was initially represented by Larry Gurney of Wichita, Kansas. A Notice of Withdrawal was filed August 1, 2002, but there is no order granting counsel's request to withdraw. Thereafter, claimant was represented by Kevin Stamper of Wichita, Kansas. Mr. Stamper filed a Notice of Withdrawal on May 12, 2004. Again, there was no notice of hearing filed and no order was entered concerning counsel's request to withdraw.

RECORD AND STIPULATIONS

The record considered by the Board includes the August 13, 2004 transcript of proceedings on the Motion to Dismiss, together with the pleadings contained in the administrative file. There were no stipulations taken by the court nor any otherwise presented by the parties.

ISSUES

Respondent filed a Motion to Dismiss on May 24, 2004, after claimant failed to appear at two (2) medical examinations scheduled with Dr. David J. Clymer in Kansas City, Missouri.² Respondent's motion requested the dismissal of this workers compensation claim pursuant to K.S.A. 44-518. The ALJ granted that motion and claimant appealed.

The ALJ announced at the conclusion of the hearing that "[b]ased on what has been presented today, the motion to dismiss will be granted and I will assess \$600 to the claimant."³ The ALJ directed respondent's counsel to prepare an order. The Order on Motion to Dismiss is dated August 13, 2004 and stamped "received" August 16, 2004. That Order contains no findings of fact nor does it state the grounds upon which claimant's claim is being dismissed. In addition, the Order provides that "the claimant is assessed cancellation fees in the amount of \$600.00."⁴ Again, there is no explanation for how that amount was arrived at nor the basis for assessing this sum to the claimant. These facts must be gleaned from the transcript of the hearing and statements of counsel.

The issue for the Board's review is whether claimant refused to submit to an examination and, if so, whether this claim should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and having considered the parties' arguments, the Board finds that the ALJ's Order on Motion to Dismiss should be reversed.

A pre-hearing settlement conference was conducted on December 12, 2003. Thereafter, the ALJ entered an Order for Independent Medical Examination appointing "Dr. Ebelke, a neutral physician to perform an evaluation on [c]laimant for rating purposes and

² It is noted that claimant resides in Liberal, Seward County, Kansas, and the venue of this case lies in Seward County, Kansas. It is over 400 miles from Liberal, Kansas to Dr. Clymer's office located at 1010 Carondelet, Kansas City, MO.

³M.T.D. Trans. at 13 (Aug. 13, 2004).

⁴Order on Motion to Dismiss (Aug. 13, 2004).

restrictions, if any.”⁵ The Order further provided that “[t]he attorneys are prohibited from engaging in ex parte conversations or correspondence with the physician until the physician has issued his report.”⁶ This Order for Independent Medical Examination was never modified nor amended by the ALJ and there has not been a subsequent order entered appointing a different “neutral physician” to perform an evaluation on claimant.

From statements of counsel, which are not evidence, and from correspondence attached to respondent’s Motion to Dismiss, it can be surmised that Dr. Ebelke was either unable or unwilling to perform the court-ordered examination and counsel agreed between themselves to substitute Dr. Clymer in place of Dr. Ebelke to perform the independent medical evaluation and issue the desired report to the ALJ. There is no indication that the ALJ ever acquiesced in this arrangement. Regardless, the ALJ clearly never entered an order designating Dr. Clymer as the neutral physician and never ordered claimant to attend an examination by Dr. Clymer.

Claimant was the only witness called to testify at the August 13, 2004 hearing. Although an interpreter was present, it appears claimant testified in English. Claimant said he missed the first appointment with Dr. Clymer because his truck broke down on the way to the appointment. “What if a person would have an appointment, if you go the hospital, if you broke down on the road, what - - what you do? If you don’t have telephone with you, you know, the first time is why I don’t go because I broke down on my truck. It’s a ‘69 truck and was broke down on the road. I cannot make it.”⁷

Claimant said he understood his second appointment with Dr. Clymer was cancelled because they had not received his x-rays. “The second time, I’m off the city, yes. I’m off the city and three days before I call if the X ray there. She say not. Better you don’t come because we don’t have X rays. This is the reason, not because I don’t want to go. I broke down and second time they don’t have the X-rays.”⁸

No one from Dr. Clymer’s office testified and the correspondence between claimant’s counsel and respondent’s counsel were not offered as exhibits at the motion hearing. The only exhibit is a fee statement from Dr. Clymer itemizing his charges.⁹

⁵Order for Independent Medical Examination (Dec. 16, 2003).

⁶*Id.* at 1 and 2.

⁷M.T.D. Trans. at 12.

⁸*Id.* at 13.

⁹It is noted that Dr. Clymer’s charges do not comply with the Medical Fee Schedule. See K.S.A. 44-510i(c)(3).

Based upon the record presented the Board cannot conclude that claimant refused to attend any medical examinations.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 13, 2004 Order on Motion to Dismiss entered by Administrative Law Judge Pamela J. Fuller should be and is hereby reversed.

IT IS SO ORDERED.

Dated this _____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Efrain Brito Gonzalez, 2000 Windsor, Liberal, KS 67901
Kevin T. Stamper, Attorney for Claimant
Lawrence M. Gurney, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and Wausau Underwriters Ins. Co.
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director